No. 82802-4

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 36625-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ERIC D. WISE,

Appellant.

BRIEF *AMICUS CURIAE* OF THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (WACDL)

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I. INTRODUCTION

Washington Association of Criminal Defense Attorneys (WACDL) submits this amicus brief in support of Mr. Wise's claim that closing a portion of jury selection without first conducting a *Bone-Club*[1] hearing is a structural error that requires reversal.

The Court of Appeals decision in this case (148 Wn. App. 425, 200 P.3d 266 (2009), *review granted*, 2010 Wash. LEXIS 1094 (July 9, 2010), pre-dated this Court's decisions in *State v. Strode,* 167 Wn.2d 222, 217 P.3d 310 (2009), and *State v. Momah,* 167 Wn.2d 140, 217 P.3d 221, *cert. denied*, 131 S.Ct. 1060 (2010). Because this case is on "all fours" with *Strode,* this Court must reverse the appellate court's decision and remand for a new trial based on that case alone. However, because the lower court opinion posits several justifications for avoiding reversal, WACDL sets forth each such purported justification from the opinion below and explains why it is contrary to the law.

We are, however, especially concerned about two of the bases for the appellate court's decision: the claim that conducting *voir dire* in chambers constitutes only partial, rather than full, courtroom closure, and the claim that such courtroom closure is not a "structural" error. These

[1] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

errors have cropped up in state briefing and lower court decisions for years.

Given some uncertainty created by the different outcomes in *Strode* and *Momah*, WACDL further asserts that it is important for this Court to address these two issues directly and to conclude that: conducting a portion of *voir dire* in chambers or a closed courtroom constitutes complete, not partial, closure; and complete closure is a structural error, requiring reversal.

II. FACTS

WACDL relies on the facts set forth in the respective briefs of the parties and the Court of Appeals' decision which summarized s:

> During jury selection, the trial court read a list of potential witnesses and gave the venire an opportunity to raise numbered cards if anyone knew a particular witness. Seven potential jurors were acquainted with at least one witness. As a follow-up question, the trial court asked whether "the fact that you're acquainted with some of these [potential witnesses] would make it difficult for you to hear this case fairly." Suppl. Report of Proceedings (RP) (June 26, 2007) at 6. Four venire persons answered affirmatively. The trial court then asked if any potential jurors had been burglarized in the past or knew someone who had been burglarized. Four of the jurors answered affirmatively. The trial court also asked if any jurors had relatives or close friends in law enforcement; 19 answered affirmatively. Three jurors answered affirmatively when asked whether their acquaintance with someone in law enforcement would "make it difficult for you to sit as a fair juror in this case." Suppl. RP (June 26, 2007) 8.

The trial court then posed a series of additional questions to the group with the venire members answering affirmatively by holding up numbered cards. Before this questioning, the trial court stated: "[I]f there is anything ... that is sensitive and you don't want to speak about it in this group setting[,] [j]ust let us know. I make a list on my notebook and we take those jurors back into chambers so that we can ask those questions more privately." Suppl. RP (June 26, 2007) at 11-12. Although there is nothing on the record indicating that either party requested private questioning of jurors, neither the State nor Wise objected to this process.

After this group questioning, the trial court directly questioned particular venire members. The judge prefaced each question with "are you comfortable telling me ... here or would you like to go to chambers." Suppl. RP (June 26, 2007) at 13. Juror 43 requested that he be questioned in chambers. The trial court then stated, "At this time, we are going to take a number of jurors into chambers and begin a question-a series of questions there. We'll start with Juror No. 43 and then, if counsel will approach, I'll get the numbers for the other jurors." Suppl. RP (June 26, 2007) at 20-21. The trial judge, Wise, his counsel, the prosecutor, and the court reporter went into chambers to question eight potential jurors who had requested that they be questioned privately.

In chambers, but on the record, the trial court asked prospective jurors about health problems, time constraints, and their relationships with witnesses and law enforcement officials. Upon returning to the courtroom, *voir dire* continued and the trial court gave the parties each an opportunity to ask specific questions of the potential jurors. During this questioning, one prospective juror requested to speak in chambers. The trial court also called an additional juror into chambers to ask about a response on her questionnaire concerning her history of criminal convictions. The trial court, parties, and court reporter moved to chambers for this questioning as well and returned to the courtroom to complete jury selection.

Wise, 148 Wn. App. at 430-32.

III. ARGUMENT

A. Introduction

The material facts of this case are indistinguishable from those in *Strode.* In both cases, the trial judge invited jurors to answer sensitive or personal questions in chambers without first conducting a *Bone-Club* hearing. In both cases, the trial court neglected to inquire about the position of the defense or defendant on such in-chambers questioning. In both cases, defense counsel participated in the in-chambers questioning of prospective jurors. In both cases, only the court and the parties were present during this closed hearing, although the proceedings were recorded.

This Court reversed in *Strode.* This Court should reverse here, too.

The facts of this case are easily distinguished from those in *Momah, supra.* The record does not reveal, as it did in *Momah,* that Mr. Wise was aware of his right to a public trial, but that he sought to affirmatively waive that right. The record does not reveal, as it did in *Momah,* that the trial court sought input from both defense counsel and the prosecution prior to and on how to narrowly tailor the closure. Finally, the record does not reveal, as it did in *Momah,* that the court was closed "to

safeguard [defendant's] constitutional right to a fair trial by an impartial jury, not to protect any other interests." *Strode*, 167 Wn.2d at 151-52. In the case at bar, the only interests apparently considered by the trial court were the privacy interests of jurors.

As a result, unlike most cases which come to this Court, this case does not present an open issue. Instead, *Strode* controls. Reversal is required.

WACDL now turns to the justifications for affirmance advanced in the opinion below, and addresses each in turn.

B. When the Court Excludes All Members of the Public From a Hearing, There is a "Full" or "Complete" Closure for Purposes of Constitutional Analysis Regardless of Whether the Hearing is Recorded or Transcribed

The Court of Appeals held:

> The trial court did not order a closure of the courtroom itself and we presume the courtroom and the proceedings conducted there remained open. The court reporter was present in chambers during questioning, as were all parties, and our record contains a full transcript of the proceedings. Closure, if any, was temporary and partial, below the "temporary, full closure" threshold of *Bone-Club.*

Wise, 148 Wn. App. at 436.

This holding is incorrect. Actually, excluding all members of the public from a portion of jury selection constitutes a temporary, full closure

as this Court's caselaw makes clear. *Strode,* 167 Wn.2d at 228; *State v. Brightman,* 155 Wn.2d 506, 516, 122 P.3d 150 (2005); *Bone-Club,* 128 Wn.2d at 258-59, 261. *See also In re Orange,* 152 Wn.2d 795, 808, 100 P.3d 291 (2004) (emphasizing that the trial court erred because it failed to engage in the *Bone-Club* analysis before permitting a *full* closure of the proceedings).

A partial closure occurs when only certain individuals are excluded. In *State v. Gregory,* this Court distinguished between full closures and temporary, partial closures of the courtroom. *State v. Gregory,* 158 Wn.2d 759, 815-16, 147 P.3d 1201 (2006). There, Gregory argued that the trial court violated his right to public trial when it required his aunt to leave the courtroom during his grandmother's testimony. *Gregory,* 158 Wn.2d at 815. This Court distinguished *Brightman, Orange,* and *Bone-Club,* emphasizing that those cases involved full closures of the courtroom whereas *Gregory* involved the exclusion of one person from the courtroom for a limited time. *Gregory,* 158 Wn.2d at 816.

Federal law is in accord with this distinction. *See United States v. Sherlock,* 962 F.2d 1349, 1357 (9th Cir.), *cert. denied,* 506 U.S. 958 (1992) ("Here we do not have a true 'closure' of proceedings, but a

temporary exclusion from the courtroom of defendants' families during one witness's testimony.").

The decision below utterly ignored *Gregory* and other precedent when it concluded that excluding all members of the public from part of the process of jury selection was only a "partial" closure. To the contrary, the courtroom was fully or completely closed.

C. A Contemplated Closure Always Triggers the Trial Court's Duty to Conduct a Hearing.

The court below also held that the trial court was not required to conduct a *Bone-Club* closure analysis *sua sponte* prior to temporary relocation of *voir dire* to chambers. *Wise*, 148 Wn. App. at 436.

The lower court was wrong. *Bone-Club* expressly held that it is the contemplated closure, not a defendant's objection, that triggers "the trial court's duty to perform the weighing procedure." *Bone-Club*, 128 Wn.2d at 261. *Cf. Presley v. Georgia*, __ U.S. __, 130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010) ("Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials.").

In fact, this Court has expressly held that an opportunity to object holds no "practical meaning" unless the court informs potential objectors of the nature of the asserted interests. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 39, 640 P.2d 716 (1982).

In this case, neither party requested the in-chambers questioning. Neither party objected to the process. But the fact that neither party objected – when the trial court neglected to invite comments on this procedure – is irrelevant. Instead, the trial court's preliminary decision that it would question jurors in chambers triggered its duty to conduct a hearing and make findings, before concluding that closure was warranted.

D. A Defendant Does Not Waive His Personal Right to a Public Trial Where His Counsel Does Not Object, And Then Participates in Questioning Prospective Jurors in Chambers. Because Wise Did Not Waive His Constitutional Right, This Case Does Not Raise a Standing Issue.

The lower court's majority opinion held, "Wise is not entitled to a new trial on that basis because (1) he waived his own public trial right and (2) he lacks standing to defend the public's right to an open trial under article I, section 10 of the Washington Constitution." *Wise*, 148 Wn. App. at 436.

The appellate court erred. Controlling authority holds that the failure to object does not waive the right to raise the issue for the first time on appeal. *Strode,* 167 Wn.2d at 229 ("Strode's failure to object to the closure or his counsel's participation in closed questioning of prospective jurors did not, as the dissent suggests, constitute a waiver of his right to a public trial."); *Brightman*, 155 Wn.2d 506, 614 ("the defendant's failure to

object at trial to the courtroom closure did not effect a waiver.") (internal quotes removed).

Because Wise did not waive his right, there is no need to decide whether he has standing to assert a violation of the public's right to open proceedings.

WACDL recognizes that this Court has previously noted its division on the issue of whether a defendant can assert the public's right to open proceedings. *See e.g., Strode,* 167 Wn.2d at 236 (Fairhurst, J. concurring) ("While I agree with the lead opinion's result in this case, I do not agree with its conflation of the rights of the defendant, the media, and the public."). *But see State v. Easterling,* 157 Wn.2d 167, 179, 137 P.3d 825 (2006) ("Were we to conclude that the closure did not violate Easterling's constitutional right to a public trial, the trial court's failure to comply with *Bone-Club* still constitutes a violation of the public's right under article I, section 10 to an open public trial, which exists separately from Easterling's right."). This case, however, is not the proper vehicle to attempt to resolve that conflict for the simple reason that Wise did not waive his own right to an open trial.

A criminal defendant can certainly waive his right to an open trial, although a trial court need not accept the waiver. But when a defendant seeks to waive his right to a public trial, the trial court is still obligated to

conduct a *Bone-Club* hearing. Whether a defendant who has personally waived his right to a public trial can nevertheless assert on appeal the public's right to open proceedings where the trial court abused its discretion is a question best reserved for another day. *But see United States v. Alcantara,* 396 F.3d 189 (2d Cir. 2005) (finding a violation of First Amendment right to public access to sentencing proceeding and remanding for a new sentencing hearing where defendant had not preserved his Sixth Amendment right).

This Court's holdings make clear that Mr. Wise did not waive his constitutional right through his attorney's failure to object or through his attorney's subsequent participation in the *voir dire* conducted in a closed courtroom. The State does not ask this Court to overrule itself and fails to make any showing that this Court's waiver rule is either wrong or harmful. This Court should hold that Wise can raise this issue for the first time on appeal.

E. Individual *Voir dire* Does Not Require Closure of the Courtroom.

The appellate court attempted to justify the closure of the courtroom by arguing that if jurors had been allowed to make certain statements in the presence of the entire venire, "the jury pool would have been tainted." *Wise*, 148 Wn. App. at 445. While this may be true, it

justifies only individual *voir dire*, not closure of the courtroom – a crucial distinction overlooked or ignored by the Court of Appeals. That court's decision perceived a tension between competing rights that does not exist.

WACDL certainly agrees that the right to an impartial jury encompasses the right to take reasonable steps designed to insure that the jury is impartial. *See, e.g., Groppi v. Wisconsin,* 400 U.S. 505, 91 S.Ct. 490, 27 L.Ed.2d 571 (1971); *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Aldridge v. United States,* 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931).

Moreover, the informed exercise of jury challenges is an essential element of insuring jury impartiality. Indeed, the first Justice Harlan, speaking for a unanimous United States Supreme Court, called the right to challenge jurors "one of the most important of the rights secured to the accused" and concluded that "[a]ny system for the empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." *Pointer v. United States,* 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208 (1894). *See also Momah,* 167 Wn.2d at 151-53 ("we permit the accused to make tactical choices to advance his own interests and ensure what he perceives as the fairest result.").

Washington courts have therefore consistently held that while the manner of conducting the *voir dire* is within the trial court's discretion (*State v. Johnson*, 77 Wn.2d 423, 462 P.2d 933 (1969); *State v. Robinson*, 75 Wn.2d 230, 450 P.2d 180 (1969)), a trial court must grant the defendant "every reasonable protection" in examining potential jurors. *State v. Hunter*, 183 Wash. 143, 153, 48 P.2d 262 (1935); *State v. Wilson*, 16 Wn. App. 348, 355, 555 P.2d 1375 (1976).

Where there is a risk that potential jurors have been biased by prior knowledge of the case or defendant, and may poison the venire with their frank responses, there is a protective alternative that is far less intrusive than courtroom closure: examining jurors who indicate they know something about a case individually. This permits both parties to discern whether the individual juror is biased, without simultaneously contaminating the entire pool by repeating the information to the group.

This is hardly a novel approach. ABA CRIMINAL JUSTICE STANDARD 8-3.5, which is entitled "Selecting the jury," provides:

> (a) If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure should take place outside the presence of other chosen and prospective jurors. An accurate record of this examination should be kept by a court reporter or tape recording whenever possible. The questioning should be conducted for the purpose of determining what the prospective juror has read and heard

> about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective juror that an inability to case aside any preconceptions would be a dereliction of duty.

Likewise, the National Legal Aid and Defender Association (NLADA) performance standards provide:

> (3) If the *voir dire* questions may elicit sensitive answers, counsel should consider requesting that questioning be conducted outside the presence of the remaining jurors and that the court, rather than counsel, conduct the *voir dire* as to those sensitive questions.
>
> (4) In a group *voir dire*, counsel should avoid asking questions which may elicit responses which are likely to prejudice other prospective jurors.

NLADA PERFORMANCE GUIDELINE 7.2. Neither guideline, designed to ensure a minimally competent standard of practice, makes any mention of the necessity to close the courtroom in order to avoid "contamination" of other jurors.

By sequestering the panel and examining potential jurors individually, both parties can more thoroughly examine potential jurors regarding possible prejudice, without risking the impartiality of the rest of the panel by being forced to reveal the potentially prejudicial information in open questioning. "Whenever there is believed to be a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material, the examination . . . shall take

place outside the presence of other chosen and prospective jurors." American Bar Association, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 3.4(A), cited in *State v. Frederick*, 20 Wn. App. 175, 179, 579 P.2d 390, *review denied*, 91 Wn.2d 1001 (1978), *cert. denied*, 440 U.S. 985 (1979). *See also* National Jury Project, *Jurywork: Systematic Techniques* 41 (1979); National Jury Project, *The Jury System: New Methods for Reducing Prejudice* 28 (1975).

Individually questioning jurors does not constitute a closure of the courtroom. *See e.g., State v. Vega,* 144 Wn. App 914, 917 n.4, 184 P.3d 677 (2008), *review denied*, 165 Wn.2d 1024 (2009) ("[J]urors are sworn officers of the court). Thus, they are not general members of the public. Therefore, no weighing of the *Bone-Club* factors is required when a trial judge allows questioning of a juror apart from the other jurors. And, a judge may allow individual juror questioning apart from the other jurors considering the court's duty to determine if, given a juror's state of mind, the juror can try the case impartially and without prejudice to the substantial rights of either party.").

Other jurisdictions recognize this distinction. For example, in *State ex rel. Storer Broadcasting v. Gorenstein*, 131 Wis.2d 342, 388 N.W.2d 633 (Wis. Ct. App. 1986), the trial court concluded that partial closure of *voir dire* was necessary to protect defendant's right to a fair

trial, but it did so without holding a formal hearing, taking any evidence, or making any findings of fact. *Id.*, 131 Wis.2d at 344 n.2. The trial court based its closure order on the "fact" that defendant could not otherwise get a fair trial. The court held: "While this may be a valid reason for ordering closure, it was insufficient here." The court continued:

> The trial court's closure order was too severe a remedy here. Its concern with the venire's exposure to pretrial publicity was appropriate, but to close the courtroom to the general public to accomplish this insulation of some of the prospective jurors was inappropriate and unnecessary. Those jurors who stated they had not been exposed to any media coverage of the event could have been asked to retire and those jurors who had been subject to media influence could have been examined in public *out of the presence of the balance of the panel.*

Id., 131 Wis. 2d at 350 (emphasis added).

The State also argued below that requiring potential jurors to answer questions on sensitive issues in front of the venire violates the jurors' constitutional right to keep personal matters private from the government. State prosecutors, who work for the government, nevertheless routinely ask jurors sensitive questions in most trials. The State can certainly choose to stop this practice and/or can voluntarily absent itself when the defense seeks to elicit sensitive information which is relevant to juror bias. However, requiring jurors to answer these

questions in open court means only that the answers will be revealed to spectators, most of whom have no connection to the government.

F. Structural Error

Complete courtroom closure, without a *Bone-Club* hearing, for the sole purpose of protecting only jurors' privacy interests, is a structural error that mandates reversal without a showing of prejudice. *Strode,* 167 Wn.2d at 231 ("By conducting a portion of the trial (jury *voir dire*) in chambers without first weighing the factors that must be considered prior to closure, prejudice to Strode is presumed. This error cannot be considered harmless...").

While the federal courts have held that in some cases the *remedy* is to remand for a new public hearing, rather than a new trial, this Court has not adopted that line of reasoning. *Compare Waller v. Georgia,* 467 U.S. 39, 41-43, 48-49, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (remanding for a new hearing); *Easterling,* 157 Wn.2d at 181 (remanding for a new trial). More importantly, the Supreme Court has not adopted that remedy for *voir dire* closure – only for closure of other hearings. For that reason, the only possible remedy for a closed courtroom violation during jury selection is a new trial. Once again, because the issue of remedy for other types of closed court violations is not presented in this case, this Court should wait for the appropriate case to consider and to decide such issues.

IV. CONCLUSION

Based on the above, this Court should reverse and remand for a new trial.

DATED this 4th day of April, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 4th day of April, 2011, a true and correct copy of the foregoing BRIEF *AMICUS CURIAE* OF THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (WACDL) was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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Attached for filing are the following:

Motion for Permission to File Brief Amicus Curiae on Behalf of WACDL WACDL Amicus Brief